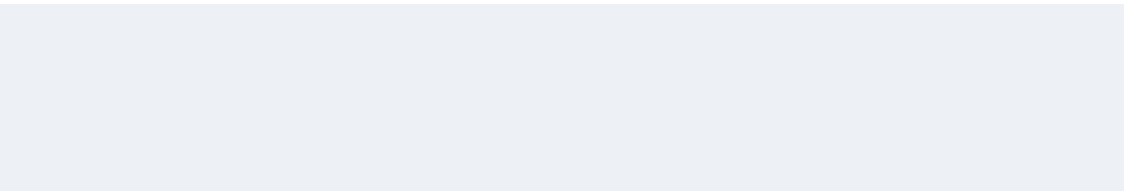


LABOR & EMPLOYMENT

New York Enacts Sweeping Sexual Harassment Legislation
Part 1: Mandatory Written Sexual Harassment Policy and Annual Training

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New York State recently enacted legislation that impacts all private- and public-sector employers. The new legislation amends and supplements the New York State Labor Law; Executive Law, also known as Human Rights Law; State Finance Law; Civil Practice Law and Rules; Public Officers Law; and General Obligations Law. Importantly, the changes will impact how employers train and educate their workforces, whether and how employers settle claims of sexual harassment, and the terms and conditions of a person's employment. These changes create new sources of potential employer liability.

This is the first in a series of legal alerts discussing these radical changes to New York State law and how the changes will impact the workplace.

For years, management attorneys counseled employers to maintain a written sexual harassment policy and conduct sexual harassment training for all managers, supervisors, and employees. Having a written policy prohibiting sexual harassment and training employees on the policy are vital tools to help prevent and defend against claims of unlawful discrimination, harassment, and retaliation under the NYSHRL and Title VII of the Civil Rights Act of 1964. New York has now made both of these tools mandatory.

Mandatory Sexual Harassment Prevention Policy

The new legislation adds § 201-g to the NYSLL and directs the New York State Department of Labor (NYSDOL) and New York State Division of Human Rights (NYSDHR) to work together to create and publish a Model Sexual Harassment Prevention Guidance Document and Policy. Once developed, this guidance and policy will be posted by both the NYSDOL and NYSDHR on their websites. Further, all New York State employers must enact a written sexual harassment prevention policy (or amend their current policy), distribute it to all of their employees, and ensure that the following areas are covered:

1. Prohibits sexual harassment consistent with guidance issued by the NYSDOL in consultation with the NYSDHR and provides examples of prohibited conduct that would constitute unlawful sexual harassment.
2. Includes information about the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be additional applicable local laws.
3. Includes a standard complaint form.
4. Includes a procedure for the timely and confidential investigation of complaints and ensures due process for all parties.
5. Informs employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially.
6. States that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue.
7. States that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

While employers may have many of these items covered in their current sexual harassment policies, there are several items, including the following four, that many existing policies are unlikely to include.

The first and probably most radical change that employers will have to make to their policies is providing employees with information on how to file an external complaint of sexual harassment against the company and what remedies (i.e., damages) employees may recover under federal, state, and local laws. The new statute requires employers to include in their sexual harassment policy information on how an employee may file a claim with NYSDHR, US Equal Employment Opportunity Commission, NYS Supreme Court, and other applicable courts or administrative agencies. Additionally, employers with work locations in multiple counties, cities, towns, or villages will have to provide information about all local laws prohibiting sexual harassment in the workplace. Have no doubt about it: employers are now mandated to educate their employees about how they can sue the employer.

The second change is requiring employers to include a standardized claim form for employees to utilize when filing an internal complaint of sexual harassment with the employer. (It's important to note that this form will not relieve the employer of investigating verbal or anonymous complaints of sexual harassment.) Employers will need to consider or revisit:

1. How the complaint form will be submitted.
2. What information will be included.
3. To whom it will be submitted.
4. A bypass mechanisms in the event the alleged harasser is the individual to whom internal complaints would normally be submitted.
5. Who will investigate the complaint.

Third, sexual harassment policies must now describe the investigation procedure and provide for due process for all employees. Many employers currently indicate that sexual harassment complaints will be investigated in as confidential a manner as possible and include generic language about the investigation process. The new provision of the NYSSL clearly mandates that employers will have to provide more details about the investigation process and specifically address their need to complete the investigation in a timely fashion and provide due process for all employees.

Fourth, employers will have to revisit their codes of conduct to ensure that sexual harassment is considered employee misconduct and that supervisors and managers who knowingly allow sexual harassment to occur are engaging in employee misconduct.

The code of conduct and sexual harassment policy must clearly indicate that both types of employee misconduct are subject to disciplinary action up to and including termination. The policy must also indicate other types of discipline that can be imposed, including verbal or written warnings, mandatory counseling, suspension with pay, and suspension without pay.

It is critical that employers review their entire employee handbook to ensure that any policy involving sexual harassment is revised consistent with the new requirements. At a minimum, employers must adopt the sexual harassment policy promulgated by the NYSDOL and NYSDHR but are free to establish policies that exceed the requirements of state law.

Mandatory Sexual Harassment Training

The NYSDOL and NYSDHR are charged with producing a model training program designed to prevent sexual harassment in the workplace. Once developed, employers must use the mandatory training materials, although, of course, they may provide training that exceeds the minimum standards.

All NYS employers must provide sexual harassment training to all employees on an annual basis. Given the mandatory nature of the training program, employers should use tools like the following in order to be able to prove to the NYSDHR or a private litigant that the training occurred.

These tools might include:

1. Training sign-in and sign-out sheets
2. Training materials
3. Videos of the training session
4. Training certificates of completion

Employers need to determine what to do for employees who miss the mandatory training session and for new employees hired between yearly training sessions. NYS is also requiring that the training be “interactive,” implying that the employees must be able to ask questions. It also may suggest the training has to be in person. Employers will have to wait for additional guidance, but until that guidance is published, employers should assume the training must be in person.

The mandatory yearly training for all employees must include:

1. An explanation of sexual harassment consistent with guidance issued by the NYSDOL in consultation with the NYSDHR.
2. Examples of conduct that would constitute unlawful sexual harassment.
3. Information about the federal, state, and local statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment.
4. Information about employees' rights of redress and all available forums for adjudicating complaints.

Effective Date

Governor Cuomo signed the law on April 12, 2018. The provisions covered by this alert will take effect in 180 days. It is not clear, however, when the NYSDOL and NYSDHR will issue a model policy and sample sexual harassment training materials, whether the training will have to be completed in 2018, and whether the annual training component will be measured by a calendar year, fiscal year, or some other basis.

Conclusion

It is a brave new world in New York. The #MeToo movement propelled lawmakers to enact sweeping changes on sexual harassment that impacts all employers, requiring them to establish a written sexual harassment policy and train employees each year on sexual harassment.

The next legal alert in our series will address the changes that have been made to the State Finance Law and sexual harassment certifications that employers who bid on state contracts will have to provide.

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